IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1964

No. 1079

DEAN D. HILL, COUNTY AUDITOR OF CLARKE COUNTY, IOWA; GEORGE T. NICKLES, COUNTY AUDITOR OF WAYNE COUNTY, IOWA, AND ALBERT DRAKE, COUNTY AUDITOR OF RINGGOLD COUNTY, IOWA,

Appellants,

vs.

CHARLES L. DAVIS AND ARTHUR J. LEWIS,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

JURISDICTIONAL STATEMENT

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May, 1964

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

JURISDICTIONAL STATEMENT

Appellants appeal from the Memorandum Opinion and Judgment Entry of a Three-Judge Court convened in the United States District Court for the Southern District of Iowa, filed and entered on January 14, 1964, the same being a final Order as to the validity of certain provisions of the Constitution of the State of Iowa. The

Judgment, in effect, was a Declaratory Judgment and granted a permanent Injunction against the various members of the Executive Council of the State of Iowa as such, and in their individual elective capacities, against the Attorney General of the State of Iowa, and against twelve County Auditors of the State of Iowa, who were joined in their respective elective capacities, and also as representatives of all of the County Auditors in the State of Iowa. The Judgment of the Three-Judge Court further required immediate corrective action of the General Assembly of the State of Iowa, under threat of further Federal Court intervention and provided a minimum apportionment formula, based upon Federal Constitutional Standards in conjunction with a defeated proposed Amendment to the Constitution of the State of Iowa. The Judgment effectively invalidates the basic portions of the Iowa Constitution relating to legislative apportionment, and all of the implementing reapportionment statutes enacted pursuant thereto.

OPINIONS BELOW

A. Final Order here sought to be reviewed:

Appendix I—Memorandum Opinion and Judgment Entry, both filed January 14, 1964.

B. Earlier Judgment Entry:

Appendix II—Judgment Entry, filed May 3, 1963.

C. Earlier Reported Opinion in the same case:

Davis v. *Synhorst*, 217 F. Supp. 492 (S.D. Iowa 1963), the Memorandum Opinion filed with the Judgment Entry of May 3, 1963.

GROUNDS FOR APPELLATE JURISDICTION

A. Nature of the Proceeding

This is an action for Declaratory Judgment and Injunction brought under the provisions of 28 U.S.C., §2281, to restrain, on the ground of unconstitutionality under the provisions of the Constitution of the United States, the actions of certain officers of the State of Iowa in the enforcement and execution of the Statutes of the State relating to the apportionment of the General Assembly, pertaining to both the Senate and the House of Representatives, the said Statutes being enacted pursuant to and in compliance with certain provisions of the Constitution of the State of Iowa. The plaintiffs alleged that the Statutes of the State of Iowa are in compliance with the mandates of the Constitution of the State of Iowa, but that the State Constitution, as amended by the people in 1904, as further amended in 1928, and by reason of population shifts over the years, creates such legislative malapportionment as to result in deprivation of civil rights as are guaranteed by the Due Process Clause and by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and further that the existing apportionment infringes upon the guarantee of a Republican form of Government as secured by Article IV, Section 4, of the United States Constitution.

The plaintiffs claimed that these violations of 42 U.S.C., Secs. 1983 and 1988 (17 Stat. 13 and 16 Stat. 144) conferred jurisdiction upon the United States District Court under 28 U.S.C., Sec. 1343. A Three-Judge Court was convened pursuant to 28 U.S.C., Secs. 2281 and 2284.

A Motion to Dismiss was filed by the defendants and was overruled by the Three-Judge Federal District Court,

and jurisdiction was assumed on the basis of *Baker* v. *Carr*, 369 U.S. 186.

The case proceeded to trial, and thereafter the majority of the Three-Judge Court filed its Memorandum Opinion on May 3, 1963, which opinion is now printed in 217 F. Supp. 492. Also, on May 3, 1963, the Court filed its Judgment Entry (See Appendix II); the Court at that time deferred opinion upon all Constitutional issues pending the outcome of an election to be held on December 3, 1963, on a proposed Constitutional Amendment which would repeal the existing Constitutional Apportionment provisions. The question of the validity of this proposed Constitutional Provision was also presented in the plaintiffs' Petition, but that question has now become moot.

The proposed plan was rejected by a majority of the voters on December 3, 1963, and the Three-Judge Court then reconvened.

On January 14, 1964, the Court filed its Memorandum Opinion and Judgment Entry (See Appendix I), holding that the Iowa Constitution was invidiously discriminatory and holding prospectively invalid Sections 34, 35 and 36 of Article III and the implementing legislation enacted pursuant thereto. The Court reserved jurisdiction to conduct further hearings and make further orders, but the Order was final as to the validity of the Iowa Constitutional provisions.

B. Dates of Judgment and Appeal

The final Order here sought to be reviewed was made and entered herein on January 14, 1964.

Notice of Appeal to the Supreme Court of the United States was filed by these appellants in the United States District Court for the Southern Division of Iowa on March 9, 1964.

C. Statute Conferring Jurisdiction upon the Supreme Court

This Appeal is taken pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 926, 28 U.S.C., Sec. 1253. This is an appeal from an order granting, after hearing, a permanent injunction in a civil action required by law to be heard and determined by a District Court of Three Judges.

D. Cases Believed to Sustain Jurisdiction of the Supreme Court in This Appeal

Appellants submit that the following cases decided by this Court sustain its jurisdiction of this appeal. *Baker* v. *Carr*, 369 U.S. 186; *Gray* v. *Sanders*, 370 U.S. 921; *United States* v. *Georgia Public Service Commission*, 371 U.S. 285; *Paul* v. *United States*, 371 U.S. 245; *Florida Lime & Avocado Growers, Inc.*, v. *Jacobsen*, 362 U.S. 73; *Eichholz* v. *Public Service Commission of State of Missouri*, 306 U.S. 268; *Parr* v. *United States*, 351 U.S. 513; *Catlin* v. *United States*, 324 U.S. 229.

E. State Constitution and Statutes Involved

While this action also involves the validity of Chapters 41 and 42 of the Code of Iowa, 1962, Volume 1, Pages 112-114, it is conceded by all of the parties that these Chapters were enacted pursuant to and in compliance with Article III, Sections 34, 35 and 36 of the Constitution of the State of Iowa, Volume 1, Pages lxxii—lxxiii, Code of Iowa, 1962. These three Sections of the Constitution of Iowa were adopted in their present form by Amendment No. 2 of 1904, otherwise known as the Twelfth Amendment, with the exception of the last clause of Section 34 which is italicized below, and which was adopted by the Amendment of 1928, otherwise known as the Six-

teenth Amendment. These Amendments creating the present Iowa Constitution are in Volume 1, Page lxxxiii, Code of Iowa, 1962, and the full taxt of these Sections now reads as follows:

SECTION 34 — SENATORS — NUMBER — METHOD OF APPORTIONMENT. The Senate shall be composed of fifty members to be elected from the several senatorial districts, established by law, and at the next session of the General Assembly held following the taking of the State and National Census, they shall be apportioned among the several counties or districts of the State, according to population as shown by the last preceding census, *but no county shall be entitled to more than one (1) Senator.*

SECTION 35 — REPRESENTATIVES — NUMBER — APPORTIONMENT. The House of Representatives shall consist of not more than one hundred eight members. The Ratio of representation shall be determined by the dividing of the whole number of the population of the State as shown by the last preceding State or National census, by the whole number of counties then existing or organized, but each county shall constitute one representative district and be entitled to one Representative, but each county having a population in excess of the ratio number, as herein provided of three-fifths or more of such ratio number shall be entitled to one additional representative, but said addition shall extend only to the nine counties having the greatest population.

SECTION 36 — RATIO OF REPRESENTATION. The General Assembly shall, at the first regular session held following the adoption of this Amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation, and apportion the additional representatives as hereinbefore required.

QUESTIONS PRESENTED BY THE APPEAL

The following questions, set out in the Notice of Appeal, or fairly comprised therein, are presented by this appeal:

(1) Is the present Legislative Apportionment in both the House of Representatives and in the Senate of the State of Iowa invidiously discriminatory against plaintiffs and others similarly situated?

(2) Are either or both the Second Amendment to the Constitution of the State of Iowa of 1904 or the Sixteenth Amendment of 1928 providing the method of legislative apportionment void and invalid?

(3) Are Chapters 41 and 42 of the Code of Iowa, 1962, enacted pursuant to and in compliance with State Constitutional Mandates, and setting up the present Senatorial and Representative Legislative Districts void and invalid?

Under the facts of this case, answer to these questions necessarily will raise the following subsidiary questions:

(a) Does the Equal Protection Clause require that one house of a bi-cameral State Legislature be apportioned solely upon the principle of strict numeral equality of population among districts?

(b) Does the Equal Protection Clause require that both houses of a bi-cameral State Legislature be apportioned solely upon the principle of substantial numeral equality of population among districts?

(c) Does the Equal Protection Clause prohibit to the people of a sovereign state, the power originally preserved to them by the Tenth Amendment to the United States Constitution, the power to adopt by State Constitution a bi-cameral State

Legislature in which one house is apportioned solely upon the principle of strict or substantial numerical equality of population among districts, and in which the membership of the other house is elected from traditional political sub-divisions, such as counties, and in which these members are elected by the people of their own sub-division?

(d) Does the present Iowa Constitution and apportionment laws enacted pursuant thereto, apportioning one house of a bi-cameral legislature on the basis of county lines, but with additional recognition of highly populated counties, and the other house upon the principle of substantial numeral equality of population, but with a limitation on the maximum number of Senators allowed any county, result in such invidious discrimination as to deprive citizens of equal protection of the laws?

(e) May a Federal Court, declare a State Constitutional Provision duly adopted and ratified by a majority of the people thereof, assuming it was valid at the time of its adoption, and for many years thereafter, to be prospectively null and void and impose upon the people of the State a new apportionment system in compliance with its own announced minimum standards by threat of Judicial intervention or judicial apportionment?

STATEMENT OF THE CASE

Plaintiffs, two labor union officials, and residents of the most populous county in Iowa, filed this class action challenging the Constitutionality of the Constitution and the laws of Iowa enacted pursuant thereto governing apportionment of both houses of the General Assembly. They alleged that under existing apportionment laws, their votes for elected members of the Legislature amount

to less than the votes of citizens of other Legislative Districts. Plaintiffs claimed that the disparity in population of districts electing State Senators and Representatives was invidiously discriminatory against the plaintiffs and their class and deprived them of equal protection of the laws, of liberty and property without due process of law, and of a Republican form of Government as guaranteed by Article IV, Section 4 of the United States Constitution. The named defendants were the Secretary of State, the Governor, the Lt. Governor, the Auditor of State, the Treasurer of State, the Secretary of Agriculture, all in their official elective capacities, and as the Executive Council of the State of Iowa, the Attorney General, and twelve County Auditors who were joined as representatives of their entire class.

All of the defendants were represented in the trial court by the Honorable Evan Hultman, Attorney General of Iowa, now an announced candidate for the office of Governor of the State, and who has refused to appeal the decision of the Three-Judge Federal District Court striking down the Iowa Constitution. The present appellants are three of the named original defendants and are appealing from the Judgment entered as representatives of their class and as representatives of all of the people of Iowa who are interested in protecting the validity of their Constitution.

A Motion to Dismiss was filed by the defendants and was overruled by the Three-Judge Court and jurisdiction was assumed on the basis of *Baker* v. *Carr*, 369 U.S. 186. All parties conceded that the apportionment statutes of Iowa then existing were in compliance with the Iowa Constitutional provisions and that the question before the Court was the validity of the Iowa Constitutional provisions themselves.

The case proceeded to trial, and thereafter the majority of the Three-Judge Court filed its Memorandum Opinion on May 3, 1963, now printed in 217 F. Supp. 492. Also on May 3, 1963, the Court filed its Judgment Entry (See Appendix II), but the Court deferred decision on the validity of the Iowa Constitutional provisions at that time, preferring to wait until submission of a proposed Constitutional Amendment to the voters on December 3, 1963. That proposed Constitutional Amendment, commonly called the Shaff Plan, was later rejected by a majority of the voters, and the Court then reconvened.

On January 14, 1964, the Court filed its Memorandum Opinion and Judgment Entry (See Appendix I), holding that the Iowa Constitutional Provisions, Sections 34, 35 and 36 of Article III, and the implementing legislation enacted pursuant thereto, are invidiously discriminatory against the plaintiffs and their class, and the Court declared them to be prospectively null and void and inoperative for all future elections to the General Assembly of the State of Iowa. The Three-Judge Court, under threat of further judicial intervention, then required the General Assembly of the State of Iowa to meet in Special Session, and to enact interim apportionment legislation in compliance with the general guide lines set out in the Memorandum Opinion, and the Court stated that it was reserving jurisdiction to conduct further hearings and make further orders.

The Three-Judge Court found that invidious discrimination was present in the pattern of representation alone, and refused to enter into the political thicket and attempt to determine whether the plaintiffs have established specific instances of discrimination against them and members of their class. The Three-Judge Court found, as is clearly required under the Iowa Constitution, Article III,

Section 35, that the House of Representatives consists of one hundred eight members, ninety-nine of which are elected from each of the ninety-nine counties, and the additional nine of which are elected one each from the nine most populous counties. The Court found that the House of Representatives is potentially controllable by the fifty-five smallest counties, containing 27.4 per cent of Iowa's total population and which can elect a majority of the House of Representatives. The Court found great disparity between the populations of the various representative districts, as would be expected in a house based upon a county-line theory.

With regard to the Senate, the Court found that in spite of the Constitutional mandate to apportion according to population, the limitation of one Senator per county, adopted by the Constitutional Amendment of 1928, worked a substantial discrimination against the more populous counties. The Court found that the mean Senatorial District population would be approximately 55,000 and that there are seven counties with populations substantially greater than that figure. Five of these seven counties have from two to five times the population of the average District. The Court found that the most extreme variance was approximately nine to one, and that 35.6 per cent of the population of the State could in theory elect a majority of the Senate.

There was no finding and no evidence in the record as to the population figures or applicable percentages of representation at the time the Constitutional provisions in question were adopted. Solely upon the basis of present population figures and numbers alone, the Court found the disparity in population among legislative representative and senatorial districts was invidiously discriminatory and declared the Iowa Constitutional provisions to be prospectively null and void.

This appeal was perfected from the Judgment Entry of the District Court, thus striking down the Iowa Constitution and declaring the apportionment provisions to be prospectively null and void and inoperative for all future elections to the General Assembly of the State of Iowa.

REASONS FOR PLENARY CONSIDERATION

The integrity of a duly enacted Constitution of a Sovereign State of these United States is here in question. The future composition of the General Assembly of the State of Iowa and the right of the people of an individual State to determine by Constitutional procedures their own representative form of Government awaits the outcome of this appeal.

The Iowa Reapportionment Case, unlike many of the cases across the country, squarely presents to the Court the question of the validity of a State Constitution in its bare form, when measured against the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. There is no question here of discriminatory legislation without approval of a majority of the people of the State, and there is likewise no question of a failure to comply with the State Constitution by the Legislature. The Iowa Constitution having been stricken down, there is presently no guide for the apportionment system in Iowa except that minimum standard imposed by the Three-Judge District Court in its Memorandum Opinion and Judgment Entry of January 14, 1964.

Probable jurisdiction has already been noted in several other cases raising constitutional issues involving various aspects of apportionment of Legislatures of other States. Some of these cases have already been submitted and await decision.

Apportionment litigation by its novelty, its gravity, its political aspects, and by its very nature calls for individual review and decision as to each State. The Constitution and laws of each State governing apportionment of the various types of State Legislatures, when challenged must be tested individually against the standard of Equal Protection which may be required by the United States Constitution. There is no occasion or reason to consider constitutionality of the apportionment laws of any one State as a guide for any other State. In this case, final adjudication of the validity of the Iowa Constitution was entered on January 14, 1964, by the Judgment Entry of the Three-Judge Court. The Judgment was that the Iowa Constitution and the Statutes enacted pursuant thereto were invidiously discriminatory, now unconstitutional, and prospectively null and void. Unless the Judgment is set aside or modified on appeal in this Court, the judicially fashioned minimum apportionment standards contained in the Memorandum Opinion of the District Court will forever be binding upon the State of Iowa, and the makeup of the General Assembly will be one house on strict population and any deviation from strict population in the other house must be on some rational, undefined, basis. This case is now in proper posture for effective and final review by this Court.

This appeal will necessitate decision of the extremities of Federal Jurisdiction in apportionment cases. The Iowa case will test the extremities of the Baker v. Carr doctrine, both as to the right of the people of a State to prescribe their own form of Government, and as to the propriety of the lower Federal Courts imposing their own unguided standards upon State apportionment.

This appeal also presents squarely the question of whether it is possible for the majority of the electors of a State to discriminate against themselves in such a fash-

ion as to deprive themselves of equal protection of the laws. The Iowa case involves a situation where a majority of the citizens of the State have adopted a Constitution for their guidance and where these plaintiffs-appellees now come before the Court and claim that they are the majority, but that they are being discriminated against by their own duly adopted Constitution.

Finally, this appeal will require decision of the limits of the Doctrine of invidious discrimination as used in Baker v. Carr. The Iowa Constitution, as amended in 1928, creates one house of a bi-cameral system on basically area factors, with additional representatives to the nine most populous counties, and the Iowa Senate is created basically on strict population, but with the limitation of a maximum of one senator per county. Should the Court find that the 1928 Amendment was invidiously discriminatory when enacted, then it is faced with decision of the system established by the 1904 Amendment. This system squarely presents the situation of one house based on strict population and the other based upon political sub-divisions, the ninety-nine Iowa Counties, with an additional member to each of the nine most populous counties.

The appeal presents substantial constitutional questions involving construction and application of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and fully justifies plenary consideration by this Court, including briefs on the merits and oral argument.

Respectfully submitted,

WARD REYNOLDSON
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Counsel for Appellants

May, 1964

APPENDIX I

Memorandum Opinion

Before VAN OOSTERHOUT, Circuit Judge, STEPHENSON and McMANUS, District Judges.

STEPHENSON, District Judge.

This matter came on for further hearing pursuant to Order of this Court dated May 3, 1963, *Davis* v. *Synhorst*, 217 F. Supp. 492 (S.D. Iowa). In the opinion filed at that time, this Court expressed the view that the constitutional provisions providing for apportionment of the House of Representatives established by the 1904 amendment and the limitation of one senator to a county, established by the 1928 amendment "in combination prevent proportionate representation in both houses of the General Assembly, and that the constitutional provisions as they now stand, are invidiously discriminatory and in violation of the equal protection clause of the 14th amendment." (p. 501). However, the Court deferred opinion upon all constitutional issues then pending and withheld a decree to permit the voters of Iowa to vote on a new apportionment plan (called the Shaff Plan) which had passed two sessions of the state legislature and was scheduled for a vote of the people December 3, 1963. That vote has now been held and the Shaff Plan was rejected as follows: "no" 272,382; "yes" 190,424. The parties are now before us seeking further relief.

Plaintiffs contend that a decree should now be entered declaring that: said amendments (1904 and 1928